89-1055

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

RONALD W. LATHEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioner, Norfolk Shipbuilding & Drydock Corporation,[1] and the Respondent, Ronald W. Lathey.

[1] Pursuant to Sup. Ct. R. 28.1, Petitioner, Norfolk Shipbuilding & Drydock Corporation, states that *The Flagship Group, Ltd.* and *Ciserve Norfolk, Inc.* are affiliates thereof. Both are corporations registered in the Commonwealth of Virginia and whose stock is partially owned by the Petitioner.

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ARGUMENT IN REPLY

It is respectfully suggested that this Court either reaffirm its decision in *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930) or abolish the *Jensen*[2] rule and its many exceptions. The matter is one of *stare decisis*, stability and certainty.

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[2] *Southern Pacific v. Jensen*, 244 U.S. 205 (1917).

I. *Stare Decisis* is the True Issue.

As stated in the Petition for Certiorari and conceded by the Respondent, the instant case is factually indistinguishable from this Court's decision in *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930). Both Mr. Span and Mr. Lathey were injured while performing repair work on completed vessels over navigable waters of the United States. This Court in *Span* found that such activities had a direct relation to navigation and commerce and that the state compensation act could not be constitutionally applied. *Id.* at 232. As such, the Court simply followed a long line of decisions on similar facts.[3]

Respondent makes no attempt to distinguish *Span* other than to impune its landmark status.[4] The factual scenario present in *Span* is not within the "twilight zone" and has never been regarded by the Court as a gray area. While this Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962), acknowledged that the post-*Jensen* decisions produced no sure definition of the area where state laws could constitutionally apply, it acknowledged plainly that "state compensation statutes could not, constitutionally, be applied to injuries to employees engaged in repair work on completed vessels on navigable water." *Id.* at 116 (emphasis supplied).

If this case, factually indistinguishable from *Span* and its predecessors, is allowed to remain in the "twilight zone", then the exceptions have swallowed the *Jensen* rule in *toto*. If this is so, then there are no longer any circumstances in which an injury may be characterized as a strictly maritime injury and *Jensen* itself is in the "twilight zone".

It should be kept in mind that the only reason for the passage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* (1980) ("LHWCA")

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[3] See, Petition for Writ of Certiorari, pp. 9-10.

[4] Petitioner agrees that *Span* was not a "landmark" case as it simply followed a direct line of precedent; precisely what Petitioner is requesting herein.

was *Jensen*'s commandment that the Constitution prohibited state compensation laws from applying to maritime injuries. Twice Congress tried to statutorily extend state compensation laws to maritime injuries and twice this Court rebuffed that attempt.[5] Therefore, if Virginia can constitutionally apply its compensation laws to Mr. Lathey's injury, the *Jensen* rule and the theoretically underpinnings for the LHWCA are swept away like the pilings from an ocean-front house. Overrule *Jensen*, if that is the wisdom of the Court, but do not simply allow it to wither away for that will cause unneeded litigation which will further confuse and subvert the confidence in this Court's precedent that *stare decisis* is intended to engender.[6]

It is submitted that the Petition should be granted or, in the alternative, the case reversed *per curiam* on the strength of *Span*.

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[5] See, Petition for Writ of Certiorari, p. 8.

[6] The argument that the Court's refusal to grant the writ of certiorari in this case will result in further litigation and confusion of the issues is underscored by Respondent's reliance upon this Court's *per curiam* decisions in *Bethlehem Steel Co. v. Moore*, 355 U.S. 874 (1948) (*per curiam*) and *Baskin v. Industrial Accident Commission*, 340 U.S. 886 (1950) (*per curiam*).

The underlying decisions in both *Moore* and *Baskin* involved injuries sustained by workmen who performed the majority of their work on shore but were injured while working on a completed vessel undergoing repairs while in navigable water. The lower courts found that such injuries fell within the "twilight zone". *Bethlehem Steel v. Moore*, 323 Mass. 462, 80 N.E.2d 478, 481 (1948), *aff'd per curiam*, 355 U.S. 874 (1948); *Baskin v. Industrial Accident Commission*, 89 Cal. App. 2d 637, 201 P.2d 549, *vacated and remanded*, 388 U.S. 854 (1949) (*per curiam*), 97 Cal. App. 2d 257, 217 P.2d 733, 737-738, (1950), *aff'd per curiam*, 340 U.S. 886 (1950).

As distinguished from *Moore* and *Baskin*, Mr. Lathey performed a majority of his work (over 80%) on board vessels. Mr. Lathey's injury is therefore maritime and non-local and thereby governed exclusively by the LHWCA (See appendix).

CONCLUSION

It is respectfully submitted that the decision of the Virginia Court of Appeals is in direct conflict with decisions of this Court interpreting the Constitution. Accordingly, this Court should grant the Petitioner's Writ of Certiorari or, in the alternative, reverse *per curiam*.

Respectfully Submitted,

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N.B. Lest this Court be of the opinion that the issue of concurrent jurisdiction is not one of national importance, please see the very recent decision of the Virginia Supreme Court in *McBride v. Metric Construction, Inc.*, ____ Va. ____, ____ S.E.2d ____, 6 VLR 1092 (unofficial citation) (Record No. 881154, January 12, 1990). In a case where benefits were claimed and paid under the LHWCA and no claim for state benefits was ever filed, that Court held that the exclusivity provisions of the Virginia Workers' Compensation Act nonetheless barred third-party suits against general and subcontractors, irrespective of what was thought to be clear authority for such suits under the LHWCA.

APPENDIX

VIRGINIA: IN THE INDUSTRIAL COMMISSION

RONALD W. LATHEY,

Claimant,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORP.,

Employer.

Claim No. 131-48-09

TRANSCRIPT

Hearing before Deputy Commissioner MACBETH at Norfolk, Virginia, on February 9, 1988.

All witnesses having been duly sworn, the following testimony was taken.

* * * *

DEPUTY COMMISSIONER MACBETH:
Any questions, Mr. Bilisoly?

BY MR. BILISOLY:
Q. That was April 29, 1986, right?
A. Yes, sir.
Q. Alright. Is it, is it Lathey? Am I pronouncing it right?

A. Lathey.

Q. Lathey. Okay. Mr. Lathey, your job at Norfolk Ship in April of 1986 was of an Insulator First Class? Am I correct

A. Yes, sir.

Q. Okay. And would it be fair to say that approximately 80% of your work on a general basis is done on board vessels?

A. 80% or more.

Q. Okay. And that's, what you do with Norfolk Ship, what you're doing is you're doing repair work on vessels that are in Norfolk Ship's Yard?

A. Yes, sir.

Q. Alright. The remainder of the work is, it takes place in the insulated, basically, takes place in the insulation shop fabricating materials which are going to be placed on board a vessel?

A. Yes, sir.

Q. Is that correct? Okay.

MR. BILISOLY:

I don't have any further questions.

DEPUTY COMMISSIONER MACBETH:

Okay. Thank you very much.

(Off the Record)

Witnesses dismissed.
Case concluded.